Supreme Court, U.S.
FILED
JUL 27 1998
OFFICE OF THE CLERK

No. 97-1910

In The

# Supreme Court of the United States

October Term, 1997

MARILYN ZIEMKE, CELIA SHAR and ISRAEL TRAVEL ADVISORY SERVICE, INC.,

*Petitioners,*

*vs.*

SHALOM ALMOG, IRIT ALMOG and BEN AMI GELLER,

*Respondents.*

*On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division*

## BRIEF IN OPPOSITION FOR RESPONDENTS SHALOM ALMOG AND IRIT ALMOG

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Lutz Appellate Services, Inc.

36 pp

## QUESTIONS PRESENTED FOR REVIEW

Respondents Shalom and Irit Almog respectfully submit that, when the hyperbole is stripped from the Petition, the real issues presented are:

I. Whether there is *not* a First Amendment concern, where the defamation arises in the context of private commercial speech that was uttered maliciously for the sole purpose of injuring potential trade rivals, and where no media coverage, public official or public figure is involved?

II. Whether the Petition should be denied where the Petitioners failed to raise before the New Jersey Appellate Division the issue of whether the punitive damages verdict violated the free speech clause of the First Amendment?

III. Should this Court entertain a Petition predicated upon an assertion that a punitive damage award was excessive in light of their alleged financial condition, where the Petitioners did not challenge the quantum of the punitive damage award before the New Jersey Appellate Division and steadfastly refused below to furnish the jury and the Court with the necessary financial records and information to determine the issue?

IV. Did the New Jersey Appellate Division properly determine that the New Jersey law applied to this private defamation suit where New Jersey's interest in deterring egregious and tortious conduct of its citizens is not outweighed by any substantial Israeli interests?

V. Did the New Jersey Appellate Division correctly determine that the jury charge and jury interrogatories, which permitted individual allocations of liability but did not

require them, were not plainly erroneous, where Petitioners presented themselves as one "unit", jointly conspired to defame respondents, presented one unified defense through one law firm, furnished the jury with no information to enable it to make an allocation, and failed to object thereto?

VI. Did the New Jersey Appellate Division properly determine that the jury was not advisory, where the lawyers proceeded tactically on the understanding that this was a jury trial, as did the court; the jurors had no idea during their deliberations (or at any other time) that their status was anything but that of the ultimate finders of the facts, and nothing said by the trial judge tainted the way that the lawyers tried the case to the jury, or the way that the jury deliberated?

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## STATEMENT OF THE CASE[1]

The factual recitations set forth in the Petitioners' Statement of the Case bears very little resemblance to the truth, or to the record herein. Due to space limitations, Respondents refer this Court to the factual recitation set forth at pages 149 through 155 of the February 25, 1997 opinion[2] rendered by the Superior Court of New Jersey, Appellate Division (the Honorable Sylvia B. Pressler, P.J.A.D. writing for a unanimous Court), which recitation was predicated upon that Court's careful review of the entire record below.

## BACKGROUND

As a result of a 1993 Jury verdict arising out of a 5 1/2 week trial in a lawsuit filed on October 8, 1989, Shalom Almog, Irit Almog and Ben Ami Geller (hereinafter, the "respondents") hold a judgment in defamation against Celia Shar, her adult daughter, Marilyn Ziemke, and their wholly owned Corporation, Israel Travel Advisory Service, Inc., ("ITAS"). The jury awarded the Almogs compensatory damages of $1,524,000 and $4,500,000 in punitive damages for a total of $6,024,000; and awarded Geller $40,000 in compensatory damages and $1,000,000 in punitive damages. Pursuant to special interrogatories, the jury expressly found that the defamatory statements were made by the Petitioners with actual knowledge that the statements were false.

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1. Citations to the record below will be in the following form: "Pet.#" refers to defendants' petition for a writ of certiorari to this Court; "Da#" refers to a page in defendants' Appendix to their brief filed in the Superior Court of New Jersey, Appellate Division; "Pa#" refers to a page in the Almog Respondents' Appendix to their brief filed in the Superior Court of New Jersey, Appellate Division; "Raa#" refers to a page in the Almog Respondents' Appendix to their Brief filed with the Supreme Court of New Jersey; "Tr.#" refers to the trial transcript.

2. *Almog v. ITAS*, 298 N.J. Super. 145 (App. Div. 1997).

Contrary to petitioners' assertion that an accounting firm substantiated their claims made against Respondent Almog for alleged misappropriation of monies, petitioners never provided any evidence to support such a claim.

Respondents Shalom and Irit Almog did not file suit in the New Jersey Court to preempt a potential suit by the petitioners in Israel. On November 23, 1989, the petitioners filed a retaliatory sham lawsuit in Israel against Mr. Almog seeking $550,000 in damages for fraud, embezzlement, misrepresentation and negligence, which was enjoined.[3] These Respondents dismissed their claims against Respondent Geller, as the same were not proven at trial.

Petitioners Shar and Ziemke, New Jersey residents working through Petitioner ITAS, are in the business of organizing tours to Israel for American travelers. During the period in controversy, the business was highly successful, ITAS, controlled 30% of the Untied States' Bar-Bat Mitzvah market.[4] ITAS subcontracts all the Israeli arrangements-hotels, meals, sightseeing, entertainment, transportation, and the like-to a licensed Israeli land tour operator. The groups are then conducted by a licensed Israeli tour guide acting as an independent contractor under arrangement with the land tour operator. Geller, who worked as a guide, frequently guided ITAS groups.

Sometime in 1984 Geller solicited Almog, then a colonel in the Israeli Defense Forces, to enter the travel business upon his

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3. Petitioners brought the same claim against Mr. Almog by way of counterclaim. However, Petitioners solely offered proofs with respect to one $39,000 transaction and limited their counterclaim thereto at the conclusion of the case (Raa60[21]-62[16]). Both the jury and the trial court found in favor of Mr. Almog on Petitioners' counterclaim. The sham alleged Israeli accounting report which was the basis for said suit was never produced or made part of the record herein. The Appellate Division ordered the Petitioners to delete all references thereto (Pa183).

4. At trial it was established that ITAS' tax returns bore no relation to reality.

retirement from the army and introduced him to Shar and Ziemke. In August 1985, when Almog retired from the army, he worked for the land tour operators assigned exclusively to the ITAS account. A close working relationship developed between Almog and Shar and Ziemke, who were extremely pleased with his performance.

In October 1988, the land tour operator and Geller advised the Petitioners that they believed that Almog charged ITAS for some services not actually rendered the touring groups and by not remitting certain rebates; i.e. relatively minor matters involving the cost of box lunches, the use of hostesses, the quality of buses engaged, and a small hotel prepayment discount. However, Almog's disposition of these matters was perfectly proper and in accord with industry standards and practices.

In any event, the Petitioners created *their own* allegations of wrong doing, which took on a life of their own, and increased in magnitude with the passage of time, accusing him of embezzling sums up to $500,000; calling him an embezzler, thief, schizophrenic and adulterer, etc., (all without any basis in fact). As a result, Almog was unable to find employment either in the tourist industry or in any other industry in Israel because of the savage campaign of slander and libel that Shar and Ziemke maliciously undertook against him, both in the United States and in Israel. It was not until 1990 that Almog was finally able to find work at a greatly reduced salary as a plant manager in the Dominican Republic. They published these stories to anyone who would listen, including Almog's former commanding officer, who advised him to leave Israel as his reputation and prospects were finished there. The Almogs suffered substantial physical and emotional harm as a result of Petitioners' actions.

Geller continued in Petitioners' good graces until the summer of 1990, when Geller was hospitalized after suffering a stroke. When he was released from the hospital, he entered into an agreement with a land tour operator when he was not required to work exclusively on ITAS tours and his per-tourist fee was increased

to $15. When the land tour operator's principal advised Shar and Ziemke of this agreement, they became enraged, vowed to "punish" Geller, called him a thief and refused to permit him to guide the tour scheduled for October. The land tour operator thereupon severed its relationship with ITAS and entered into a relationship with an American competitor of ITAS and Geller continued to work both for the land tour operator and other companies. The Petitioners mounted a retaliatory defamatory campaign against Geller, accusing him of having seduced the daughter of a major Israeli restaurant owner and causing Geller and his wife to be subject to criminal investigation by the Israeli tax authorities, and to suffer impairment of reputation, and emotional distress.

The Honorable Douglas Hague, J.S.C., who presided over the trial found:

> I find that the conduct of the defendants . . . was outrageous . . . I think it was vicious: I think it was unnecessary . . . I think that they defamed, outrageously, these two plaintiffs . . . I find it to be a fact that the defendants also — unnecessarily impugned his private life with no reason and no necessity to do it — it had nothing to do with their business — by indicating that he had affairs with other women . . . insofar as the Colonel is concerned . . . somehow along the line they became disoriented. Somehow along the line their zeal became misguiding — misguided and I think that their actions thereafter were unwarranted, violent and vicious, and they conducted some . . . indiscriminate broadsides against Colonel Almog . . . I think that the damage to his reputation . . . was stupendous — was terrible. And the word that I'm searching for, I think, is odious.

(Tr. 8/13/93 112:15-115:7)

The Hon. Sylvia Pressler, P.J.A.D., writing for a unanimous panel of the Appellate Division, stated:

> In summary, we are satisfied from our review of this record that the jury had an ample evidential basis from which to conclude that defendants Shar and Ziemke and their company took *concerted, malicious and purposeful action* over a significant period of time to destroy both Almog and Geller as respected members of their community, that they did so with *total disregard* of the truth or of the personal consequences to them and their families, and that in large measure they succeeded. (Emphasis added).

The Appellate Division of the Superior Court of New Jersey further found that the "evidence of defendants' intentional, malicious and egregious wrongdoing was overwhelming" *Almog v. Itas*, 298 N.J. Super 145 at 153, 160 (App. Div. 1997).

The compensatory damages phase of the trial commenced on July 12, 1993, with closing arguments on August 13, 1993. On August 16, 1993, the jury answered special interrogatories consented as to form by defendants' counsel (Da 461 *et seq.*). The jury determined that punitive damages should be awarded. Due to the trial court's vacation schedule, the trial court, with the consent of the parties and jury, suspended the trial until September 20, 1993, at which time the trial reconvened for the second (punitive damage) phase (conducted on September 20 and 21, 1993).

On August 16, 1993, following the jury's initial verdict, the trial court, *inter alia*, ordered the petitioners to furnish respondents' counsel with all of the petitioners' 1991 and 1992 personal and corporate tax returns (Raa 74[4-7]). On August 17, 1993, respondents served upon defense trial counsel notices to produce in lieu of a subpoena pursuant to N.J. Rule of Court 1:9-2. When documents were not timely received, respondents moved to compel production thereof.

On September 16, 1993, the trial court ordered the petitioners to produce 1991, 1992 and 1993 profit and loss statements for petitioner ITAS; ordered that the personal 1991 and 1992 tax returns of petitioners Shar and Ziemke be produced; and cautioned petitioners' trial counsel that the petitioners' non-production of financial information might result in a large verdict.[5] (*See, generally*, Raa 75[9]-110[4]). Petitioners' trial counsel represented to the court on September 16, 1993, *inter alia*, that petitioners' accountant (Leonard Harris, C.P.A., who was noticed by the respondents to appear at trial) would appear for trial[6] (Raa 107[15-17]).

In contrast to Petitioners' description of the trial, Judge Hague took considerable time and care in explaining to the jury the reason for the few brief interruptions during the 5 1/2 week trial, which did not affect the outcome herein.

Contrary to the false assertion that Judge Hague stated on August 13, 1993 (while charging the jury) that he had in fact only listened with ". . . half an ear . . .", what Judge Hague actually said was:

> As I told you before, you have eight minds and 16 eyes and you see much more than I could ever hope to see in this case . . . and I think that because of my over three decades of experience as a trial attorney, *I can listen* with half an ear, but I can't do it as well as you can . . .

Raa 66[19]-67[7]. Clearly, Judge Hague was merely stressing to the jury the importance of their role, and expressing his confidence in them to reach a proper verdict. Judge Hague never left the

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5. *See* resume of petitioners' failures to produce court ordered documents and information. (Pa178).

6. However, contrary to petitioners' representation, petitioners did not produce their accountant, claiming that he was on vacation and would not be returning until after trial. Raa 131[13]-133[10].

courtroom during proceedings, nor was he interrupted by another matter, as all counsel *out of respect for the Court*, immediately *stopped* and *refused* to continue until the interruption was over. At *no* time did the trial proceed without the Judge, or without the Judge's attention.[7]

Contrary to the petitioners' assertions, this was not an advisory jury as the jury had already begun deliberations in the jury room when the trial judge announced to trial counsel (emphasizing to counsel that this was to remain in the courtroom) that he would decide the case as an Israeli Judge — as the petitioners had requested.

With regard to petitioners' complaint that they were treated as one by the trial court, petitioners were, and are, truly inseparable. Based on the unique facts presented at the trial below, individual determinations of guilt were *not* required (and would have served no purpose).[8] Petitioners Shar and Ziemke (Shar's only child), who continue to reside in the same home and who are the sole principals of ITAS: (a) wrote every libelous letter jointly; (b) jointly participated in every meeting where they slandered Mr. Almog; (c) jointly conducted all aspects of their business; (d) conducted every slanderous phone conversation jointly[9]; and (e) are truly inseparable. (Raa 37[13-25]). In fact, the testimony (which was largely uncontradicted, and found to be credible and overwhelming by the jury, trial judge and Appellate Division), was that *both* petitioner Shar and petitioner Ziemke, in *each instance*, actively

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7. Petitioners' present counsel was not petitioners' trial counsel, while respondents' present counsel was also trial counsel in this matter.

8. Furthermore, petitioners offer no authority (governing at the time of trial) for their proposition that when an award is made jointly and severally against defendants, the *individual* financial circumstances of each defendant must be taken into account.

9. Petitioner Shar testified that the petitioners participated jointly in writing letters and making telephone calls. Raa 56[3]-57[17].

participated in the defamatory statements.[10] Therefore, the trial court properly denied the petitioners' *untimely* request to split them into three individual defendants for the purpose of determining liability.[11] As noted by the trial court, the entire case was presented by *one* law firm on behalf of all three defendants; they operated as one unit, and *the petitioners presented no evidence to the jury to enable it to make an allocation*; and that he did not believe that *under the circumstances* that there should be separate punitive damage awards. Nevertheless, the court *did* draft special interrogatories for the jury to decide whether there should be individual assessments or a joint award (Raa 69[13-17]; Raa 112; Raa 166[20]-168[14]). The *jurors found that the defendants had indeed acted jointly*,[12] and awarded punitive damages against the petitioners jointly.[13]

Finally, contrary to petitioners' assertion, the United States Bankruptcy Court for the District of New Jersey in *not* "awaiting the response of this court before acting further".[14] ITAS has not filed for bankruptcy, and continues as a profitable business.

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10. *See, e.g.*, the testimony of Tommy Haendler, Pamela Cohen, Benny Sivan and Ben Ami Geller (Raa 19[7]-20[4], Raa 20[9]-21[20]; Raa 10[5]-15[6]; Raa 24[1]-34[6]).

11. Judge Hague *did* instruct the jury that they could either find the petitioners individually liable or jointly and severally liable (Raa 172[10]-173[3]).

12. A review of the transcript reflects that both respondents' and petitioners' trial counsel, as well as the Court, worked from *petitioners'* proposed interrogatories until a final joint submission was reached. Raa 173.

13. As noted by the Appellate Division, the petitioners have recourse available through claims for contribution or indemnification. *Almog*, at 161.

14. The respondents are preparing a motion to dismiss the bankruptcy petition, as a bad faith filing, in what is essentially a one creditor case, filed after exhaustion of state court remedies.

## REASONS FOR DENYING THE WRIT

### I. WHERE DEFAMATION ARISES IN THE CONTEXT OF PRIVATE COMMERCIAL SPEECH, UTTERED MALICIOUSLY FOR THE SOLE PURPOSE OF INJURING POTENTIAL TRADE RIVALS, AND WHERE NO MEDIA COVERAGE, PUBLIC OFFICIAL OR PUBLIC FIGURE IS INVOLVED, NO POSSIBLE FIRST AMENDMENT CONCERNS ARE IMPLICATED, NOR DOES THE IMPOSITION OF PUNITIVE DAMAGES UNDER STATE LAW IN SUCH A CASE RAISE ANY UNIQUE DUE PROCESS OR OTHER CONSTITUTIONAL CONCERNS.

#### A. The First Amendment In The Ordinary Non-Media, Non-Public Interest Case.

Petitioners cite, without much focus, cases such as *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and invoke sweeping generalizations as to free speech and public policy, none of which are applicable. *New York Times*, *supra*, *Gertz*, *supra*, and similar cases, involve newspapers or other public media, or public officials, or matters of public concern, or both. In *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985) the Court's holding made clear that absent such public concerns, there were no First Amendment limitations on the ordinary common law concepts of libel and slander, including the awarding of punitive damages when appropriate:

> We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern. Accordingly, we affirm the judgment of the Vermont Supreme Court.

*Id.* 472 U.S. at 763.

Although the main opinion by Powell, J. in *Dun & Bradstreet*, is correctly referred to as a plurality opinion, the two Justices who concurred in the result, would have restricted the application of the First Amendment in non-media cases even more severely than the plurality opinion. Burger, C.J., 472 U.S. at 749-64, and White, J., 472 U.S. at 765-74. Both of the concurring opinions argue, *inter alia,* for the total reversal of the *Gertz* requirement for proof of actual malice, and its prohibition against punitive damages, in media and "public figure" cases. (*e.g.* Justice White: "First, I am unreconciled to the *Gertz* holding and believe it should be overruled. Second, as Justice Powell [plurality opinion] indicates, '. . . the defamatory publication in this case does not deal with a matter of public importance.' Consequently, I concur in the Court's judgment." *Id.* 472 U.S. at 774).

Thus a clear, solid, five justice majority of this Court was strongly opposed to extending First Amendment based restrictions to ordinary non-media, non-public figure, non-public official defamation cases. That ruling has neither been overruled, nor questioned, by any subsequent majority opinion of this Court. *e.g.*: *Philadelphia Newspapers, Inc. v. Hepps et al.*, 475 U.S. 767, 89 L. Ed. 783, 106 S. Ct. 1558 (1986), "In sharp contrast to *New York Times*, *Dun & Bradstreet* involved not only a private-figure plaintiff, but also speech of purely private concern." 472 U.S., at 751-752, 105 S. Ct., at 2941. A plurality of the Court in *Dun & Bradstreet* was convinced that, in a case with such a configuration of speech, ". . . the showing of actual malice needed to recover punitive damages under either *New York Times* or *Gertz* was unnecessary . . ." 475 U.S. at 774, 106 S. Ct. at 1562-63; *Waters v. Churchill*, 511 U.S. 661, 128 L. Ed. 686, 114 S. Ct. 1878 (1994), "Likewise, the possibility that defamation liability would chill even true speech has not led us to require an actual malice standard in all libel cases." 661 U.S. at 670, 114 S. Ct. at 1885, citing to *Dun & Bradstreet*.

*Dun & Bradstreet* continues to be cited for the lack of heightened First Amendment concerns in private, non-media

defamation cases in some of the most recently reported Federal District Court cases: *E.g. Food Lion, Inc. v. Capital Cities/ABC, Inc., et al.*, 984 F. Supp. 923, 932 (M.D. N.C. 1997):

> [i]n light of the reduced constitutional value of speech involving no matters of public concern, we hold that state interest adequately supports awards of presumed and punitive damages—even absent a showing of "actual malice."

(quoting *Dun & Bradstreet)*; *Corporate Training Unlimited, Inc. v. National Broadcasting Co., Inc.*, 981 F. Supp. 112, 118, n.2 (E.D. N.Y. 1997): "In cases not involving matters of public concern and therefore not implicating heightened First Amendment protections for defendants, a plaintiff need not prove 'actual malice'." (citing *Dun & Bradstreet).*

The petitioners here, and at the New Jersey Supreme Court, have never claimed, nor could they claim, that this was a media or public figure or public official case. In footnote 8 on page 13 of their petition, however, they make the bizarre claim that this is not a commercial speech case. All parties to this case were involved in the United States to Israel bar/bat Mitzvah tour business; all did business with each other, and all are competitors in some aspects of this business. The only conceivable reason the defamations were uttered was to injure potential (or actual) commercial rivals. There is considerable evidence that the defamations, and the dispute that lead up to them, arose totally in the context of the business dealings among all the parties to this action.

Petitioners, on page 9 of their brief state:

> This Court has held that in a defamation case, compensation for damage to reputation is the only legitimate governmental interest. *Gretz v. Welch, Inc.*, 418 U.S. 322, 349 (1974).

This statement so completely ignores the media versus private speech issue, as to be totally disingenuous, if not deliberately misleading. The Court in *Gertz* clearly stated at the outset:

> The principal issue in this case is whether a *newspaper or broadcaster* that publishes defamatory falsehoods about an individual who is neither a public official or a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements.

*Gretz v. Welch, Inc.*, 418 U.S. 322, 332 (1974) (emphasis added). In its holding the Court again clearly indicated that it was dealing only with the media issue:

> We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a *publisher or broadcaster* of defamatory falsehoods injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating individuals for wrongful injury to reputation, yet *shields the press and broadcast media* from the rigors of strict liability for defamation.

*Id.* 418 U.S. at 347-48 (emphasis added).

The petitioners next cite *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 818 (1986) for the proposition that "[t]his Court has recognized that constitutional challenges to punitive damages raise 'important issues' ". Petition, p. 10. The *Aetna* case involved a state statute penalizing the bad faith refusals of insurers to pay health claims. However, the Court in *Aetna* declined to pass on the propriety of punitive damages and the penalty imposed below under a new Alabama statute, as it had decided to vacate and remand

the judgment of the Alabama Supreme Court on procedural grounds[15]. A full quotation of the language referred to by petitioners (which appears at 475 U.S. 828-29 not at 475 U.S. 818) demonstrates that: (a) the language quoted is on its face clearly *dicta*; and (b) even as *dicta*, the Court did not intend to comment on the general Constitutional propriety of punitive damages in all cases, let alone punitive damages in defamation cases, but merely upon the unique issues raised by Alabama's new cause of action:

> Appellant also argues that the retrospective imposition of punitive damages under a new cause of action violates its rights under the Contracts Clause of Article I, s10; that a $3.5 million punitive damages award is impermissible under the Excessive Fines Clause of the Eighth Amendment; and that lack of sufficient standards governing punitive damages awards in Alabama violates the Due Process Clause of the Fourteenth Amendment . . . These arguments raise important issues which, in an appropriate setting, must be resolved; however, our disposition of the recusal-for-bias issue makes it unnecessary to reach them.

*Id.* 475 U.S. at 828-29.

Petitioners next refer to comments by two dissenters in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971) in which, according to petitioners, ". . . two justices expressed disapproval with the status of punitive damages in defamation law." Not only was *Rosenbloom* obviously a media case, but both dissenting justices, Marshall and Stewart, J.J., expressly based their comments on *free press* concerns:

> And fear of the extensive awards that may be given under the doctrine [punitive damages] must

15. Finding that one of the Alabama Court's justices should have recused himself.

> necessarily produce the *impingement on freedom of the press* recognized in *New York Times*.

*Id.* 403 U.S. at 83; 91 S. Ct. at 1839;

> The only constitutional caveat should be that absolute or strict liability, like uncontrolled damages and private fines, cannot be used. . . . Clearly, is *inconsistent with concepts of freedom of the press*.

*Id.* 403 U.S. at 87; 91 S. Ct. at 1841 (footnotes omitted, emphasis added).

In a private suit involving no public issues, no public figure, press or other media, there simply is no free speech justification for a private defendant to falsely utter statements intending to damage another's commercial reputation, anymore than there would be a free speech interest in shouting "fire" in a crowded theater.

**B. The Constitutionality Of Punitive Damages As Imposed By State Law In Non-Media, Non-Public Interest Defamation Cases, And Generally.**

In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), this Court again asserted its acceptance of the common law concept of punitive damages. The Court in *Pacific Mutual Life*, facing a due process challenge to a punitive damage award of $840,000 (added to a compensatory verdict of $200,000), held:

> In view of this consistent history [of punitive damage awards in the common law], we cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be per se unconstitutional.

Although Petitioners quote from the concurring opinion of Justice Scalia, they omitted that Justice's concluding comments on punitive damages at the final two paragraphs of that opinion:

> . . . But punitive damages assessed under common-law procedures are far from a fossil, or even an endangered species. They are (regrettably to many) vigorously alive. To effect their elimination may well be wise, but is not the role of the Due Process Clause. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform.
>
> We have expended much ink upon the due-process implications of punitive damages, and the fact specific nature of the Court's opinion guarantees that we and other courts will expend much more. Since jury-assessed punitive damages are a part of our living tradition that dates back prior to 1868, *I would end the suspense and categorically affirm their validity.*

*Id.* 499 U.S. at 38.

The Court again reaffirmed its confidence in the concept of punitive damages in *TXO Productions Corp. v. Alliance Resourses Corp.*, 509 U.S. 433, 113 S. Ct. 2711 (1993), where it affirmed a judgment in which a compensatory damage award of $19,000 was accompanied by a punitive damage award of $10 million, noting, *inter alia*:

> Thus, both State Supreme Courts and this Court have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages. It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.
>
> * * *

> We agree with TXO that the emphasis on the wealth of the wrongdoer increases the risk that the award may have been influenced by prejudice against large corporations. . . . We note, however, that in *Haslip* we referred to the "financial position" of the defendant as one factor that could be taken into account in assessing punitive damages. . . .

*Id.* at 113 S. Ct. 2711, 2721 and 2723.

*Honda Motor Co. Ltd. v. Oberg*, __ U.S.__, 114 S. Ct. 2331 (1994) essentially dealt with the narrow procedural issue of a state constitutional amendment purporting to cut-off judicial review of punitive damage awards in jury verdicts, which provision the Court struck as violative of due process. The Court expressly cited and quoted from *Haslip*, *supra*, and *TXO*, *supra*, reaffirming its general position that common law punitive damage verdicts are not violative of due process.

In this matter, the New Jersey Superior Court, Appellate Division, specifically reviewed the punitive damage awards herein, both as to reasonableness and due process:

> There is one last matter we address. Defendants have not challenged the quantum of punitive damages allowed by the jury. Nonetheless, and because of the [New Jersey] Supreme Court's expressed concern with runaway punitive damage verdicts *in Herman v. Sunshine Chemical Specialties, Inc.*, 133 N.J., 329, 338, 627 A.2d 101 (1993), we have carefully examined the awards were commensurate with the evidence of defendants' wealth and represent, considering the egregious nature of the torts, an acceptable ratio between compensatory and punitive damages. Most significantly, however, following the jury's return of the punitive damages verdict, the trial judge, in

> an abundance of caution, afforded defendants an opportunity to demonstrate by way of discrete financial records any alleged excessiveness. Defendants failed in the end to take advantage of that opportunity. We are satisfied that they thereby waived their right to complain of the quantum.[16]

*Almog v. Israeli Travel Service, Inc.*, 298 N.J. Super 145, 161, 704 A.2d 158, 161. It should be noted that the Appellate Division first made its own independent assessment as to the reasonableness of the awards in light of all the circumstances, and only then turned to the procedural question of petitioners' bad faith refusal to produce financial records to challenge the reasonableness of the awards.

**C. The New Jersey Courts In This Matter Consistently Applied New Jersey's Own Choice Of Law Rules In Concluding That New Jersey Law Should Be Applied On The Question Of Punitive Damages. That Choice Of Law In No Way Violates Petitioners' First Amendment Or Due Process Rights.**

At page 16, the petition concedes that the state court properly utilized the governmental interest test in determining the choice of law to be applied, yet fault the state court's application of the court's own public policy of deterrence:

> Defendants do not quarrel with New Jersey's use of the governmental interest test, and do not seek review by this Court of that state issue. Defendants do, however, contend that New Jersey's application of that test, and its explicit declaration that deterring

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16. After consenting to the post judgment appointment of an accountant by the court (to report on the petitioners' actual financial condition), the petitioners refused to furnish the financial records requested by the accountant, and chose to abandon remittitur considerations.

> speech is the overriding state interest, collides with the First Amendment and, therefore, demands the intervention of this Court.

The Appellate Division logically applied New Jersey's equally logical and Constitutionally sound choice of law rules and came to the conclusion that under New Jersey's choice of law rules New Jersey law should be applied on these facts:

> First as to choice of law. As we have noted, egregious misconduct was committed in New Jersey, elsewhere in the United States, and in Israel by New Jersey residents. Malicious defamation was published in and from this State. Key events occurred in New Jersey, including the two fateful meetings in Livingston we have already described. Underlying contracts and agreements were made here. A fuller remedy is available to the victims under New Jersey law than in Israel in respect of the scope of damages. The question is whether these significant contacts with New Jersey weight the application of the governmental interest test in favor of New Jersey law or Israeli law. We have no doubt in light of the totality of the circumstances that New Jersey's interest in the controversy as a whole is paramount to Israel's.

*Almog v. Israel Travel Advisory Service, Inc.*, 298 N.J. Super. 145, 158 (App. Div. 1997). Clearly many facts and circumstances, contacts and interests, were taken into account by the Appellate Division in reaching its choice of law decision.

*Gantes v. Kason Corp.*, 145 N.J. 478 (1996) is the case principally cited by the Appellate Division in coming to its choice of Law decision. *Almog*, *supra* 298 N.J. Super. at 158. In *Gantes*, Georgia's ten year statute of repose in products liability cases would have prevented Georgia plaintiffs from recovering for a recent injury caused by a machine manufactured in New Jersey more than ten

years ago. In allowing the Georgia resident who suffered injuries in Georgia to sue in New Jersey, the New Jersey Supreme Court in *Gantes* held that New Jersey has a legitimate interest in deterring tortious behavior of its citizens, whereas Georgia's policy (designed to cut off old claims against its manufacturers) is in no way compromised by New Jersey applying its more stringent rule against its own manufacturers, on behalf of a Georgia plaintiff. The *Gantes* Court noted that a state has no real governmental interest in seeing that its citizens do *not* recover for tortious conduct, but New Jersey, however, has a strong interest in deterring ". . . egregiously wrongful conduct. . ."[17], i.e. intentional tortious behavior, by its citizens.

There is no real conflict between the interests of New Jersey and those of Israel on this issue. As the New Jersey Federal District Court, sitting in diversity, and applying these New Jersey choice of law rules noted:

> At the heart of interest analysis is the realization that often the interest of only one state will be furthered by application of its law on a particular issue. This presents a "false" conflict and a court should apply the law of the only interested jurisdiction.

*Colley v. Harvey Cedars Marina et al.* 422 F. Supp. 953, 955 (D.N.J. 1976, footnote omitted). Similarly, the Appellate Division here observed:

> By the same token, we do not see how Israeli law can reasonably be regarded as offended by one of its citizens being fully vindicated in the courts of another jurisdiction. In sum, New Jersey's strong deterrent interest does not appear to collide in any appreciable way with the policy of Israeli law.

*Almog, supra* 298 N.J. Super. at 159.

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17. *Almog v. ITAS*, 298 N.J. Super. 145, 159 (A.D. 1997).

## II. PETITIONERS HAD A FULL JURY TRIAL BELOW WHICH RESULTED IN A VERDICT, AND ALTHOUGH THE TRIAL JUDGE ELECTED NOT TO ENTER JUDGMENT ON THAT VERDICT, THE APPELLATE DIVISION REVERSED HIM AND, AFTER REVIEW, REINSTATED THE VERDICT AND DIRECTED THAT JUDGMENT BE ENTERED ON IT. PETITIONERS SUFFERED NO DENIAL OF DUE PROCESS IN THIS PROCEDURE, NOR ON THE BASIS OF ANY OF THE OTHER MATTERS RAISED IN THE PETITION.

The jury in this matter heard all the evidence, was properly charged, and rendered a verdict which to its knowledge was the only verdict in this matter. The trial judge, unbeknownst to the jury, had misgivings as to his choice of law decision during their deliberations which he expressed only to counsel, and not to the jury. After the verdict was announced, the trial judge decided not to enter judgment on the jury verdict which was based on application of New Jersey law, but rather to enter his own judgment, based on his application of Israeli law.[18] The Appellate Division, the next highest intermediate appellate court, decided that the trial court's final choice of law decision was erroneous and reinstated the jury verdict after thoroughly reviewing same. *See* discussion, *infra*, at page 17, *et seq*. The New Jersey Supreme Court, *after both sides thoroughly briefed and argued an appeal to them,* apparently concluded that petitioners did not have any appealable issue, and withdrew certification as improvidently granted, and later denied petitioners' motion for reconsideration.

Had the trial judge simply entered the jury verdict, and the Appellate Division affirmed same, the result to the petitioners, in terms of their procedural rights, or the ultimate outcome, would have been no different. Petitioners had one jury trial, a post trial revision of that verdict by the trial judge (which had the same effect as a judgment notwithstanding the verdict), an appellate review of both, resulting in the reinstatement of the jury verdict,

18. At *no* time did the jury *ever* learn of this disposition.

and a full briefing and oral argument before the highest court of the state, which only thereafter declined to upset the rulings below. The petitioners did not suffer any denial of procedural due process. The procedure did not differ in effect from any civil case where a judgment notwithstanding the verdict is ordered by a trial judge, but reversed by an appellate court, which after review elects to reinstate the original jury verdict.

The trial court did not erroneously characterize the jury as "advisory"[19] until after the jury had already been charged and sent out to commence deliberations; nor was the jury, itself, *ever* told that it would merely be acting in an "advisory" capacity.

In *Thompson v. Parks*, 963 F.2d 885 (6th Cir. 1992), the court, in reinstating the jury verdict, held that where the trial court failed to determine that the jury would be advisory until after the trial was completed, the jury verdict was valid. The court in *Bereda v. Pickering Creek Industrial Park, Inc.*, 865 F.2d 49, 53 (3rd Cir. 1989), found that ". . . as a matter of law . . .", where the trial court had not decided that the jury would act in an advisory capacity until ". . . after the verdict had been rendered . . .", the jury was then in fact not an advisory jury.

As noted by the Hon. Sylvia B. Pressler, P.J.A.D., in writing for the Appellate Division:

> . . . it was not until the jury retired to deliberate, after summations and charge, that its status as the

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19. The trial court indicated its intent was to present the Appellate Division with *all* foreseeable options, to avoid a remand. Prior to the trial court advising that *he* would decide the matter sitting as an Israeli Judge, the defendants had already submitted their proposed *jury* charges based on *New Jersey* law and positions of the *Restatement (second) Chapter 25* (which the defendants asked the trial court to follow). *See* Pa85 *et seq.*, and Pa-116 *et seq.*, in particular. Thus, when the trial Judge explained that the punitive damage phase would be submitted to the jury to decide under the law of New Jersey, the defendants (who had three attorneys at their side, and were given 40 days advance notice) did not *then* (or at any *other* time during the remaining three days of trial) object. Raa 70-72 *et seq.*

> final arbiter was challenged. The lawyers proceeded tactically on the understanding that this was a jury trial, as did the court. Nor did the jurors have any inkling during their deliberations that their status was anything but that of ultimate finders of the facts. That was what the judge had told them, and that is how they proceeded. The same is true of the later punitive damages trial. Thus, nothing to the contrary said by the trial judge entered into or affected or tainted the way the lawyers tried the case to the jury or the way the jury deliberated. In effect, this jury never functioned or was constituted or denominated as an advisory jury. Consequently, there is no prejudice we can perceive in accepting the jury's fact-finding as the final verdict.

*Id.* 298 N.J. Super. at 160.

**Based On The Unique Facts Presented Herein, It Was Not Violative Of Due Process For The Trial Court Not To Require Individualized Determinations From The Jury As To The Liability And Damages Attributable To Each Defendant.**

Based on the unique facts presented at the trial below, individual determinations of guilt were *not* required (and would have served no purpose).[20] The defendant mother and daughter: (a) wrote every slanderous letter jointly; (b) jointly participated in every meeting where they slandered Mr. Almog; (c) jointly conducted all aspects of their business; (d) conducted every slanderous phone conversation jointly [21]; (e) even reside together;

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20. Furthermore, defendants offer no authority (governing at the time of trial) for their proposition that when an award is made jointly and severally against defendants, the *individual* financial circumstances of each defendant must be taken into account.

21. *See, e.g.*, testimony of petitioner Shar. Raa 56[3]-57[17].

and (f) are truly inseparable. (Raa 37[13-25]). In fact, the testimony (which was largely uncontradicted, and found to be credible and overwhelming by the jury, trial judge and Appellate Division), was that *both* ladies, in *each instance*, actively participated in the defamatory statements.[22] Therefore, Judge Hague properly denied the defendants' untimely request to split them into three individual defendants for the purpose of determining liability.[23] As noted by the trial court, the entire case was presented by *one* law firm on behalf of all three defendants; they operated as one unit; and *that no information was presented to the jury by the defendants to enable it to make an allocation*; and that he did not believe that *under the circumstances* that there should be separate punitive damage awards. Nevertheless, the court *did* draft special interrogatories for the jury to decide whether there should be individual assessments or a joint award (Raa 69[13-17]; Raa 112; Raa 166[20]-168[14]). Because the *jurors found that the petitioners had indeed acted jointly*, it awarded punitive damages against the petitioners jointly.

In *Refuse & Env. Systems v. Industrial Serv. of Am.*, 932 F.2d 37, 40 (1st Cir. 1991)[24], the trial court instructed the jury that:

> (1) if the jury "found joint and several liability on the various counts, damages should be assessed jointly and severally"; and that
>
> (2) The law does not require the injured party to establish how much of the injury was done by one

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22. *See, e.g.*, the testimony of Tommy Haendler, Pamela Cohen, Benny Sivan and Ben Ami Geller (Raa 19[7]-20[4], Raa 20[9]-21[20]; Raa 10[5]-15[6]; Raa 24[1]-34[6]).

23. Judge Hague *did* instruct the jury that they could either find the defendants individually liable or jointly and severally liable (Raa 172[10]-173[3]).

24. Which the defendants cite to (out of context) in their brief.

> person and how much . . . was done by another . . . [it] permits the injured party to treat all concerned in the injury jointly, and all are liable to respond to the plaintiff in the total sum you find to be damages.

*Id.* The First Circuit found both instructions to be proper. *Id.*

The only New Jersey "authority" to which petitioners cite, *Wilson v. Savino*, 10 N.J. 11, 89 A.2d 399 (1952), is clearly distinguishable in that *Wilson* was decided on post trial motion as to liability. The New Jersey Supreme Court specifically held therein that there was a question of fact as to whether or not each of the alleged owners was actively involved in the running of the defendant newspaper. Liability in the matter *sub judice* was decided by the jury; and the record reflects that the only evidence presented to the jury was that the two individual defendants, and their wholly owned corporation, acted in concert, in all respects.

## III. TO THE EXTENT THAT CONCEPTS OF SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT CAN HAVE ANY POSSIBLE APPLICATION TO A CIVIL TORT JUDGMENT IN STATE COURT, NO KNOWN DUE PROCESS RIGHTS OF DEFENDANTS WERE VIOLATED IN THE PROCEEDINGS BELOW.

While petitioners lead this Court to believe that the verdict was excessive and arbitrary, a review of the record clearly shows that the evidence supports the unanimous decision of the Superior Court of New Jersey, Appellate Division. Thus, the punitive damage award was not "grossly excessive" and in no way violates the Due Process Clause of the Fourteenth Amendment.

### A. Degree of Reprehensibility

Petitioners reference numerous unrelated cases in an attempt to support their argument that the punitive damage awards herein

are excessive. However, this sidetracking put forth by the petitioners simply provides no support for this Court to grant the writ.

In the case of *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D. N.Y.), while faced with the wholly unrelated issue of human torture, the Court, some 14 years ago, awarded a total of $10,000,000 in punitive damages (not $5,000,000 as represented by petitioners). In the matter of *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th. Cir. 1996), the Eleventh Circuit Court of Appeals, again presented with the unrelated issue of human torture, affirmed a total punitive damage award of $900,000 (not $300,000 as represented by petitioners). In citing to *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995), petitioners focus on the levying of punitive damages for the unrelated issue of human torture, and fail to mention the separate $1,000,000 compensatory and punitive damage awards based upon defamation. Finally, petitioners cite to *J.S. and M.S. v. R.T.H. and R.G.H.*, 301 N.J. 150, 693 A.2d 1191 (N.J. App. 1997), in which a punitive damage award was given based upon the unrelated issue of sexual abuse.

Petitioners claim that the compensatory damage award is greater than the combined net worth of all three defendants. As noted by Judge Pressler, ". . . we have carefully examined the evidence adduced at the punitive damages trial. Suffice it to say that the awards were commensurate with the evidence of defendants' wealth . . ."[25] The petitioners chose to refuse to comply with notices to produce highly relevant financial and business records[26] and chose *not* to present *any* expert testimony on the related issues of damages, their income, the value of ITAS, or of the individual petitioners'

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25. *Almog* at 161.

26. Resulting in the trial court taking judicial notice that documents requested by respondents were not produced by the defendants (Raa 64[11]-65[10]). *See also* the trial court's post verdict October 1, 1993 letter ruling referring to ". . . the defendants' flagrant and cavalier violation of the Court's discovery orders concerning their financial condition . . ." and ". . . defendant's almost laughably transparent failure to produce financial information." (Pa 130).

personal holdings. As a result, the respondents had to rely upon admissions made by petitioner Ceil Shar, financial statements petitioners furnished to a bank in *1987* (obtained by subpoena) (Pa187), inconsistent factual representations as to their sales and profits made by the petitioners in a contemporaneous lawsuit of which the trial court was asked to take judicial notice (Pa73), and upon certain calculations and projections made by respondent Shalom Almog and by respondents' expert accountant at trial (Pa377, Pa401).[27] Furthermore, petitioners *refused* to take advantage of the trial court's October 1, 1993 *sua sponte offer* to petitioners to cooperate with a Court appointed accountant to assist the trial court in determining whether the jury's award of punitive damages was excessive based on petitioners' true financial situation (to be ascertained) (see Pa130, Pa137, Pa138), and informed the Court that they would *not* provide any of the financial documents requested by the court appointed accountant (Pa138).[28] At trial, petitioner Shar blithely testified to giving away hundreds of thousands of dollars to petitioner Ziemke's husband and children prior to trial.[29] Raa 162 [10]-163 [6]; Raa 164 [3-15]. As noted *supra*, the extent of the malicious injury caused by the petitioners, coupled with the petitioners' blithe indifference, if not arrogance, in refusing to make disclosure of their assets and income, were undoubtedly considered by the jury, which relied upon the competent proofs presented by the respondents. Simply stated, the petitioners did not obtain an unjust result.

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27. *E.g.*, ITAS grosses approximately $6.1 million per year (Raa 122[21-25]; RAA 123[17]-124[9]; RAA 125[11-15]; and Pa84) and earns $1.642 million per year (Raa 126[6-20]; Raa 127[6-13]; Raa 128[8]-129[11]).

28. By letter to counsel dated February 23, 1994, the trial Judge noted that there had been a ". . . flagrant lack of cooperation. . ." by the defendants with the court appointed accountant (Pa 137).

29. On September 21, 1993, petitioner Shar testified that within the past year she gave her granddaughter $164,000; she gave her son-in-law approximately $200,000; that she gave each of her grandchildren about the same amount; and that she gave her other granddaughter $100,000 as a wedding gift three months prior to the trial (Raa 136[18]-162[21]).

**B. Ratio**

Clearly, the 3:1 ratio of punitive damages to compensatory damages which were awarded to the Almog Respondents is not "grossly excessive".

**C. Comparative Legislative Sanctions**

Petitioners refer this Court to the Punitive Damages Act enacted by the State of New Jersey (N.J. Stat. Ann 2A:15-5.9 *et seq.* (West 1998)) subsequent to the completion of the trial of this matter. While Petitioners concede that the act does not apply in this matter, Petitioners claim that the Act "illustrates the concern of the New Jersey legislature that punitive damage verdicts are often excessive and unreasonable".

However, the punitive damages award entered in favor of the Almog Respondents falls within the provided 5:1 ratio (between punitive and compensatory damages, respectively). Furthermore, said Act sets forth that the purpose is to ". . . punish the defendant and to deter that defendant from repeating such conduct . . ." (N.J. Stat. Ann. 2A:15-5.14(a)).

Indeed, at the time of the trial of this matter in 1993, the law of New Jersey was:

> The amount of punitive damages is a matter of resting in the sound discretion of the jury or other triers of the facts, since there is no established standard by which the amount of punitive damages may be fixed.

New Jersey Practice, Vol. 24 § 742, 2nd edition.

## CONCLUSION

The malicious conduct of the petitioners, as well as the extent of damages caused thereby, has been well documented. The respondents' proofs thereof have been accurately characterized by the New Jersey Appellate Division as being "overwhelming". Respondents Shalom and Irit Almog filed their suit in October 1989. Throughout 9 years of litigation, the petitioners have been the perpetrators of pre-trial, trial and post-trial discovery abuse, and bad faith litigation tactics. It is not at all surprising that they complain of the result. However, they received a fair trial. The Respondents are entitled to repose.

WHEREFORE, for all the reasons set forth herein, the petition for writ of certiorari to the Superior Court of New Jersey, Appellate Division should be denied.

Respectfully submitted,

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